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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-461

SOPHIE M. GRABOWSKI, individually, as personal representative of the deceased, EDWIN T. GRABOWSKI, and as guardian of the estate of the minor children of EDWIN T. GRABOWSKI,
Petitioner,

v.

NORTHERN FISHING & TRADING COMPANY, INC., a corporation, owners of the fishing vessel NORTH SEA, and ALEUTIAN KING CRAB, INC., a corporation, charterer of the fishing vessel NORTH SEA, who herein petitions for exoneration from or limitation of liability,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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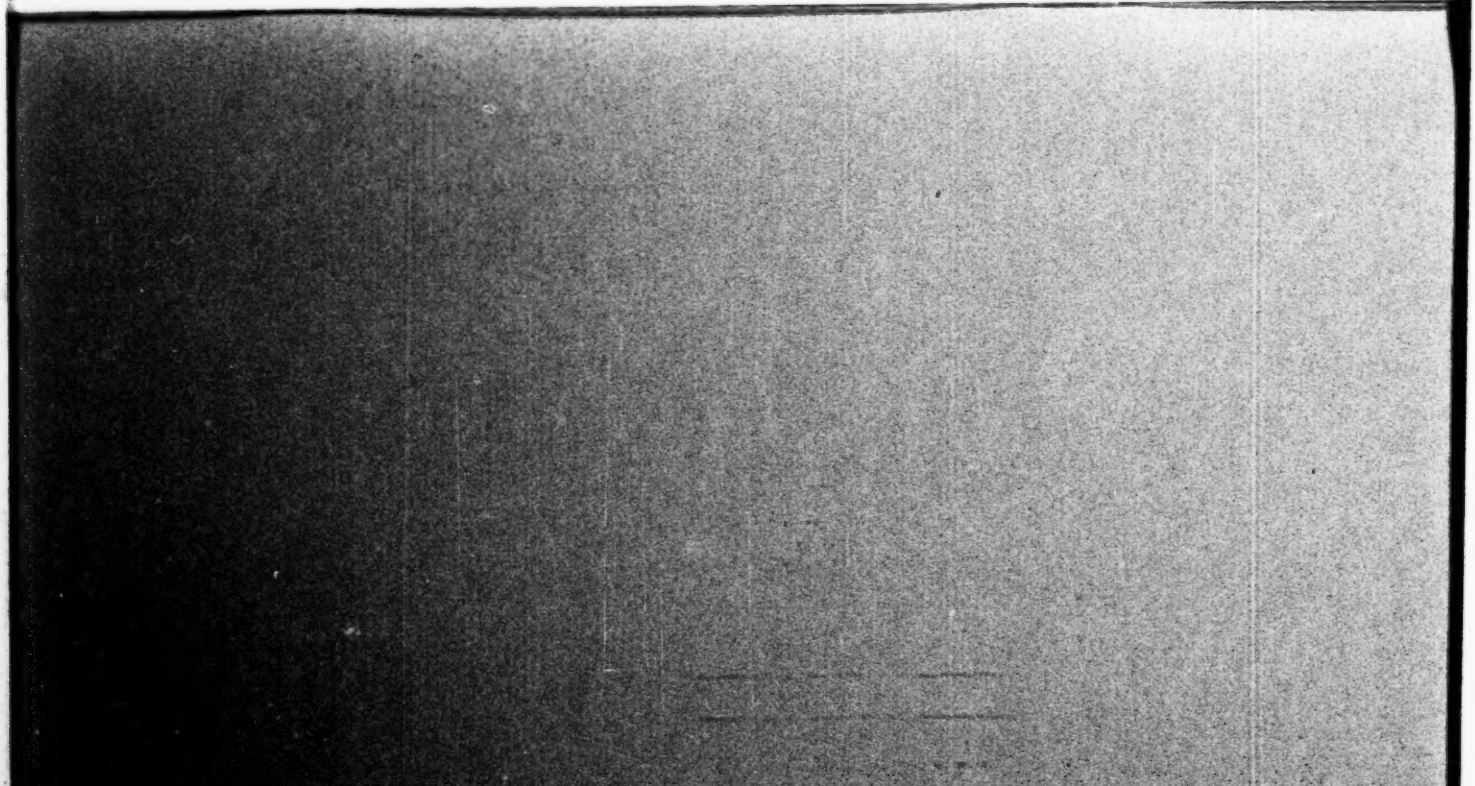

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, Sophie Grabowski, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

This case was first heard in the United States District Court, Western District of Washington, Cause No. 8348. The Opinion, Appendix page A-1 hereinafter referred to as (App.), was not reported.

This case was argued before U.S. Court of Appeals for the Ninth Circuit, and the Opinion was issued April 23, 1973. The petition for rehearing was timely filed and denied on June 20, 1973. That court's opinion appears at App. page A-3. The citation is: 477 F.2d 1267 (1973).

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. 1254. The judgment of the Court of Appeals was issued April 23, 1973. A petition for rehearing was timely filed and was denied by order of that court on June 20, 1973. This petition is timely.

Questions Presented for Review in Admiralty

I.

Does the historical compassion of admiralty for its seamen compel this court to grant certiorari to declare uniform rules throughout the circuits applicable to burden of proof and inferences and presumptions in aid thereof, when the issue is unseaworthiness in a seaman's claim for injury or death?

II.

Should the rule of the Third and Fifth Circuit Courts be adopted as the substantive law of admiralty that the loss of a vessel in known circumstances as a result of the winds and seas of a storm a vessel should reasonably have anticipated encountering, creates a presumption of unseaworthiness as a matter of law?, or

The rule of the 9th Circuit Court that such facts do not create a presumption of unseaworthiness.

Statutes Involved

1. 46 U.S.C. 183—Limitation of Liability Act. Not directly involved but set forth (App. A-13) as the statute under which the trial court proceeded.

STATEMENT OF CASE

Sophie Grabowski, petitioner in this proceeding, is the widow of Edwin T. Grabowski ("Grabowski"). Aleutian King Crab, Inc. ("Aleutian") was an Alaskan corporation that operated a King Crab cannery in Dutch Harbor, Alaska. Northern Fishing & Trading Company, Inc. ("Northern"), a corporation, was the owner of the fishing vessel *North Sea,* that sank in a storm on December 12, 1968.

In January 1968, "Northern" chartered the vessel to "Aleutian" and "Aleutian" in July of 1968 sub-chartered the vessel to "Grabowski".

This case was commenced by the respondents, "Aleutian" and "Northern", after the sinking of the vessel in a storm, and the resulting death of 3 of the crew, as a proceeding to limit liability under 46 U.S.C. 183-189. (App. A-13).

To that petition, Mrs. Grabowski cross-complained for the wrongful death of her husband.

Facts of the Demise of the *North Sea*

The Circuit Court made a substantially fair statement of the facts surrounding the loss (App. A-6, 7) and the claimant Grabowski herein paraphrases.

The only direct evidence as to the storm and the loss of the vessel were two depositions of the sole surviving crew member, Golodoff.

On December 11, 1968, the *North Sea*, with Grabowski as the skipper, after a day of fishing, elected to proceed to a new anchorage at Urilla Bay on the north central coast of Unimak Island in the Alaskan Aleutians.

The fishing vessel *Sydney*, by coincidence, sought shelter at the same time in the same bay. On the morning of December 12, 1968, the wind increased and swung out of the northwest so that the bay no longer offered shelter from the storm.

Both vessels then left the protection of the bay. The *Sydney* went out a few miles and "jogged" into the weather. It rode out the storm. The *North Sea* went out to deep water, then turned southwesterly on a "jogging", zigzag course.

The following five events preceded the loss of the *North Sea:*

(1) Before the vessel left Urilla Bay, a water pipe broke in the engine room, partially flooding the bilge. The crew made emergency repairs.

(2) While proceeding southwesterly, the vessel took a sea which knocked off the forward starboard bulwark. In order to allow the crew to remove the debris, the Captain put his stern to the storm and proceeded toward Unimak Island. After the debris was removed, the Captain completed a 360° turn and again proceeded southwesterly.

(3) About an hour later, another sea knocked off the false bridge in front of the pilot house. Again the vessel's stern was put to the storm and the debris removed.

(4) As the vessel started again to resume a southwest-

erly course, another sea entirely wiped out the pilot house. The steering controls were gone, an electrical short charged the hand rails to the engine room with electricity, and a break in the ammonia pipe system flooded the engine room with ammonia. The propelling engine quit and the vessel was a powerless hulk.

(5) An hour or so later, as the vessel took more water and sank lower in the sea, the crew attempted to launch the life raft and was swept away by the waves. Golodoff, who survived, and the body of Captain Grabowski, were found on the southwest coast of Unimak Island.

Additional Pertinent Facts

The Trial Court's Finding No. 12 in part reads:

> "*The said storm, which could reasonably have been anticipated at that time of year,* was a full gale with mountainous seas and winds gusting to hurricane force." (App. A-6)

"Northern", the owner, and "Aleutian", the charteree, offered no evidence on the issue of seaworthiness of the vessel, because they had none.

The Trial Court made no finding the vessel was seaworthy and/or unseaworthy.

The Trial Court's opinion found against the deceased on a number of legal theories, all but one of which was dismissed and *not decided* by the Circuit Court.

Basis of Circuit Court's Decision

The Circuit Court decided the case on the question of which party had the burden of proof (Opinion App. A-12)

"We have held not to be clearly erroneous Finding No. 20, to the effect that the claimant had not sustained her burden of proof (1) that there was a breach of the implied warranty of unseaworthiness, and (2) that unseaworthiness of the vessel was a proximate cause of the death of Captain Grabowski. *We have held that the court properly placed the burden of proof on the claimant.*

"Accordingly, appellant's other contentions below, though interesting, have no merit:" (Emphasis added)

REASONS FOR GRANTING THE WRIT

I. The Rules Placing the Burden of Proof and the Use of Presumptions and Inferences in Aid of Claimant in Admiralty Injury and Death Claims Predicated on Unseaworthiness of the Vessel Are Important Principles of Maritime Law That This Court Has Not Decided

This court has decided burden of proof principles in unseaworthiness claims only in the context of cargo cases: *The Edwin I. Morrison*, 153 U.S. 199, 38 L. Ed. 688, 14 S. Ct. 823 (1893); *The Southwark*, 191 U.S. 1, 48 L. Ed. 65, 24 S. Ct. 1 (1903); and *Commercial Molasses Corp. v. N.Y. Tank Barge Corp.*, 314 U.S. 104, 83 L. Ed. 89, 62 S. Ct. 156 (1941).

Despite this court's recognition, by granting certiorari in *Commercial Molasses* of the importance of the rules involved in burden of proof and the inferences and presumptions in aid thereof in cargo cases, where the rights of insurers and cargo owners were at issue, this court has not granted certiorari to decide those issues in personal injury or death actions.

Commercial Molasses at p. 108:

> "The court accordingly held that petitioner had not sustained its burden . . . We granted certiorari, 311 U.S. 643, 61 S. Ct. 394, 85 L. Ed. 410, to resolve an alleged conflict of the decision below with those of other circuit courts of appeals . . . and because of the importance in the maritime law of the principle involved."

It is manifestly more compelling, consistent with admiralty's historical compassion for seamen, for this court to grant certiorari in this matter to settle the rights of seamen and widows in injury or death actions based on unseaworthiness.

The importance of the issues addressed to this court are emphasized by the fact that they are involved in the majority of seamen's suits for injury or death, as this court has noted in *Moragne v. States Marine Lines*, 398 U.S. 375, 26 L. Ed. 2d 339, 90 S. Ct. 1772 (1970) at page 399:

> ". . . the unseaworthiness doctrine has become the principle vehicle for recovery by seamen for injury or death, overshdowing the negligence action made available by the Jones Act."

In *Commercial Molasses* (1941), this court's last expression on the burden of proof in unseaworthiness claims, this court announced two distinct rules relating to cargo loss cases:

1. ***The Rule When the Loss of Cargo Is Upon a Common Carrier***

Commercial Molasses, at page 109:

> "The burden rests upon him [the common carrier] to show that the loss was due to an excepted cause and that he has exercised due care to avoid it . . ."

2. *The Rule When the Loss of Cargo Is Upon a Private Carrier*

Commercial Molasses, at page 110:

> " . . . the bailee of goods who has not assumed a common carrier's obligation is not an insurer . . . In such a case the burden of proving the breach of duty of obligation rests upon him who must assert it as the ground of the recovery which he seeks."

Mr. Justice Douglas joined in a four Justice dissent that believed the distinction stated in *Commercial Molasses* represented a deviation from the general rule that the shipper (Owner) had the burden to affirmatively establish seaworthiness and found the distinction between private and common carriers of cargo to be illusory.

Commercial Molasses at p. 114, 115 the dissent said:

> "Where, as here, the result of a case in admiralty is made to turn upon the distinction between a common and private carrier, one may well ask whether more respect has been paid to technical niceties of the common law than befits the admiralty tradition."

There is precedence for arguing that claimants in injury and death actions should be entitled to a rule analagous to the absolute burden placed on common carriers:

Seas Shipping Co. v. Sieracki, 328 U.S. 85, 90 L. Ed. 1099, 66 S. Ct. 872 (1946) at pages 93 and 94:

> "These, [the hazards of marine service which unseaworthiness places on the men] together with their helplessness to ward off such perils and the harshness of forcing them to shoulder alone the resulting personal disability and loss, have been thought to justify and to require putting their burden, in so far as it is measurable in money, upon the owner regardless of his fault. Those risks are avoidable by the owner to the extent that they may result from negligence. And

> beyond this he is in position, as the worker is not, to distribute the loss in the shipping community which receives the service and should bear its cost."

Assuming arguendo this court does not elect to declare in seamens injury and death cases the same rule relating to burden of proof as given in *Commercial Molasses* when the loss to a cargo owner is upon a common carrier, in all events the burden of proof of seamen and widows should be no greater than that of cargo owners when the loss is upon a private carrier.

In the *Commercial Molasses* case, this court identified the role of inferences and presumptions when the cargo was lost on a private carrier and the burden of proof of unseaworthiness on the claimant shipper:

Commercial Molasses, at pages 110 and 111:

> "The burden of proof in a litigation, wherever the law has placed it, does not shift with the evidence, and in determining whether petitioner has sustained the burden the question often is, as in this case, *what inferences of fact he may summon to his aid* . . .
>
> "*Whether we label this permissible inference with the equivocal term 'presumption' or consider merely that it is a rational inference from the facts proven, it does not more than require the bailee [or owner], if he would avoid the inference, to go forward with evidence sufficient to persuade that the non-existence of the fact, which would otherwise be inferred, is as probable as its existence.* . . . and if the bailee does go forward with evidence enough to raise doubts as to the validity of the inference,which the trier of fact is unable to resolve, the bailor [claimant] does not sustain the burden of persuasion which upon the sole evidence remains upon him where it rested at the start. (Emphasis supplied)

The facts giving rise to the inference and presumption of unseaworthiness from the loss of the "*North Sea*" were:

(1) It had been built in 1946.

(2) No inspector or surveyor, to the knowledge of the owner "Northern" or the charter party "Aleutian," ever found anything wrong with the vessel because in the seven years of ownership by "Northern" they never had it inspected or surveyed.

(3) The circumstances and cause of the loss of the vessel were fully known.

(4) The damage to the vessel which subsequently caused its loss was caused by the seas in a storm which the Trial Court found "could reasonably have been anticipated."

Only one of two logical possibilities could account for the damage and subsequent loss of the vessel:

(a) A catastrophic storm no seaworthy vessel could survive.

(b) A vessel that was not as strong, staunch and seaworthy as the warranty demanded.

The trial court found the storm (App. A-6) "*could reasonably have been anticipated,*" thereby implicitly ruling out the possibility that the storm was catastrophic or beyond reasonable anticipation. Despite this prima facie case of unseaworthiness under the private carrier rule of *Commercial Molasses,* neither "Northern" or "Aleutian," unlike the petitioner for exoneration in *Commercial Molasses,* came forward with further evidence or explanation of the loss in affirmative evidence of seaworthiness.

II. There Is a Conflict Among the Circuits on the Existence of a Presumption of Unseaworthiness

A. *The Rule in the 3d and 5th Circuits Is that if the Weather Could Reasonably Have Been Anticipated the Vessel Must be Strong and Staunch Enough to Weather the Storm, or it Is Presumed Unseaworthy as a Matter of Law*

1. Third circuit

The 3d Cir. has articulated a rule for losses in storms that would indicate patent unseaworthiness under the undisputed facts in the instant case.

Eastern Gas & Fuel Associates v. Martin Marine Tr. Co., 190 F.2d 395, (3d Cir. 1950) at p. 397:

> "The court was mistaken in ruling that the presumption of unseaworthiness arising from an unexplained sinking is inapplicable to private carriage by sea. It is true that in such circumstances the burden of showing unseaworthiness is upon the complaining shipper. *Commercial Molasses Corp. v. New York Tank Barge Corp.*, 1941, 314 U.S. 104, 62 S.Ct. 156, 86 L.Ed. 89. But *the logical inference of unseaworthiness which follows from the unexplained sinking of a vessel in weather she should be able to withstand suffices to discharge that burden unless and until the carrier shall affirmatively show exculpatory circumstances.*" (Emphasis added)

The 9th Cir. denied Mrs. Grabowski the benefit of any inference or presumption of unseaworthiness that logically should follow when a fishing vessel is lost as a result of a storm that could reasonably have been anticipated. (App. A-6) The 9th Cir. inferentially indorsed the conclusion of the trial court that the cause of the loss was the severity of the storm. Such a legal conclusion as an exculpatory cir-

cumstance excusing the loss of the vessel does not follow in the 3rd and 5th Circuits from the loss of a vessel in an an anticipated storm.

Eastern Gas & Fuel at p. 396:

> "Conditions thus described and revealed [the sort of weather you would encounter off the coast in March of the year] fall far short of that severity which constitutes such a peril of the sea as excuses the failure of a vessel to weather a storm. . . . The weather must be irresistible, overwhelming, and extraordinary for the particular time of year to be a good exception . . ."

2. Fifth circuit

In *Vega v. The Malua*, 291 F.2d 415, 419 (5th Cir. 1961), the 5th Cir. applied the presumption of unseaworthiness to a personal injury claim:

> "The event occurred. The block failed. The block failed while being used for a normal expected purpose. That is, and has been, at least since *Sieracki* in 1947, a classic case of patent unseaworthiness."

The presumption of unseaworthiness that has emerged in the 5th Cir. is a logical derivative of the admiralty doctrine of seaworthiness. The test, which is spelled out in terms of matching operating proficiency against anticipated operating conditions, was stated in *Walker v. Harris, infra*, and cited and followed in *Gibbs v. Kiesel*, 382 F.2d 917, 918, 919 (5th Cir. 1961):

> "The subsidiary questions leading to ultimate conclusion of seaworthiness are therefore: what is the vessel to do? What are the hazards, the perils, the forces likely to be incurred? Is the vessel or the particular fitting under scrutiny, sufficient to withstand those anticipated forces? If the answer is in the affirmative, the vessel (or its fitting) is seaworthy. If the answer

> is in the negative, then the vessel (or the fitting) is unseaworthy no matter how diligent, careful, or prudent the owner might have been. *Mitchell v. Trawler Racer, Inc.* 1960, 362 U.S. 539, 80 S. Ct. 926, 4 L. Ed. 2d 941, 1960 AMC 1503."

In *Walker v. Harris*, 335 F.2d 185, 193 (5th Cir. 1964), an injury and wrongful death action predicated on the unseaworthiness of a vessel lost in a storm, the court expanded on the operation of the presumption of unseaworthiness:

> ". . . sinking (or other failure) under circumstances and conditions which the vessel must reasonably anticipate and overcome is the best proof of, and makes out the classic case of, unseaworthiness. Although not articulated in such terms, it is a sort of sea-going *res ipsa loquitur*. Once it is assumed (or judicially held) that the vessel must anticipate the particular hazard and be staunch enough to override it, the only escape from the inference of unseaworthiness is proof that some new, unforeseen, intervening force or factor brought about the failure of ship or gear. There is none of that here."

The language from the cited 3d and 5th Circuit opinions clearly indicates that those circuits hold that patent unseaworthiness is established upon a showing that a ship or its appurtenance failed under reasonably anticipated conditions, and a presumption of unseaworthiness follows.

B. *The Rule in the 9th Circuit Unlike the 3d and 5th Circuits Is That Affirmative Evidence of Unseaworthiness Must First Be Established and Then the Claimant May Benefit From the Inference to Establish Causation*

The rule in the 9th Cir., announced in *Walston v. Lambertsen, infra,* which case was cited as authority in the

instant case, requires affirmative proof of unseaworthiness before any inference or presumption arises to the claimant's aid, and then the inference or presumption is limited. It does not aid in proof of unseaworthiness, but only in proof of proximate cause. *Walston v. Lambertsen*, 349 F.2d 660 (9th Cir. 1965) at 662:

> "A review of the opinions in these cases and all others which might seem somewhat analogous to the case at bar makes it clear that the presumption which appellant would apply has been indulged *only when the claimant has been able to establish to the satisfaction of the trial court that the vessel was unseaworthy at the time it departed on its last voyage.*" (Emphasis supplied for language of conflict)

Mrs. Grabowski relied in great part upon *Walker v. Harris* supra, as standing for the proposition that there is a presumption of unseaworthiness when a vessel is lost in seas and storm that were reasonably anticipated. The 9th Cir. neither discussed nor explained its conclusion, but summarily dismissed *Walker v. Harris* with the comment (App. A-13):

> "(5) The reliance on *Harris v. Walker*, (5 Cir 1964) 335 F.2d 185, cert. den., 379 U.S. 903, which we do not find apposite."

If *Walker v. Harris* is, in fact, apposite, it clearly demonstrates the critical conflict of law between the 5th and 9th Circuit.

Mrs. Grabowski submits that there are no *material* differences in fact between the instant case and *Walker v. Harris*.

CONTRAST AND SIMILARITY OF FACTS

Walker v. Harris	*Grabowski v. Northern Fishing & Trading Co.*
1. Vessel an Inland Tug designed for harbors.	1. Wooden crab vessel for Alaskan waters.
2. Area of operation, relatively mild Gulf of Mexico.	2. Area of operation, Aleutians—roughest water in the world.
3. Storm 33 to 36 miles per hour, 5 to 12 feet waves.	3. Winds up to hurricane force.
4. Storm could have been anticipated.	4. Storm could have been anticipated.
5. Full facts of loss known.	5. Full facts of loss known.

The differences in the facts are not material because the doctrine of seaworthiness is relative. In giving operative effect to the presumption of unseaworthiness, it is not the absolute figures of wind velocity or wave height that are material, but the reasonably anticipated conditions in light of the anticipated uses of the vessel.

In *Walker v. Harris*, at p. 191, the Fifth Circuit stated the controlling issue:

> "The question in this case boils down then to whether winds and seas of the kind actually encountered at this fateful moment were reasonably to be anticipated. On this record there cannot be any doubt."

In the instant case, the Trial Court found that although the storm was severe, it could have reasonably been anticipated for that time of year. (App. A-6) Although the material finding of fact was therefore identical to the critical finding in *Walker v. Harris*, the 9th Circuit neither considered nor applied any presumption of unseaworthiness as a matter of law arising from the undisputed facts.

SUMMARY

In 1941, this court recognized the importance of the legal issues relating to burden of proof and permissible inferences to aid claimant in cases where cargo loss resulted from alleged unseaworthiness of the vessel. To resolve the issues certiorari was granted. *Commercial Molasses Corp. v. N. Y. Tank Barge Corp.*, 314 U.S. 104, 83 L.Ed. 89, 62 S. Ct. 156 (1941), 311 U.S. 643, 61 S. Ct. 394, 85 L.Ed. 410.

It is manifestly more important in 1973 to settle those rules relating to burden of proof and permissible inferences and presumptions as they relate to seamen and their widows for injury and death claims.

In personal injury and death cases the 3rd and 5th Circuits have applied the general principles of the *Commercial Molasses* rule for private cargo carriers; including permissible inferences and presumptions in aid of claimant's proof of unseaworthiness.

The 9th Cir. in injury and death cases has substantially departed from the principles of *Commercial Molasses* and denies any inference or presumption of unseaworthiness, recognizing only an inference or presumption of proximate cause.

The 9th Cir. should not be allowed to reject in injury and death cases inferences and presumption that are to be considered in aid of a claimant's burden of proof announced by this court as applicable to loss of cargo in *Commercial Molasses*.

In a seamen's claim for injury or death predicated upon inferences and presumptions of unseaworthiness, recog-

nized and applied to the facts in the 3d and 5th Circuits, when a vessel flounders and sinks in a storm that could have been anticipated, the outcome of the litigation should not differ solely because it is brought in the 9th Cir.

The burden of proof of a widow to collect damages for the loss of her husband should in no circuit and in no event be greater than the burden of a shipper to collect for his loss of cargo.

Respectfully submitted,

GALE P. HILYER, JR.
Attorney for Petitioner,
Sophie Grabowski

APPENDIX A

Court's Oral Opinion (Tr. 656-658)

THE COURT: One fact the evidence in this case establishes overwhelmingly is that Captain Grabowski was a good father and a good husband. He had a very fine family. He was energetic, courageous, devoted to his family, and wanted to see them live well and enjoy the better things of life. To this end he drove himself and took unreasonable risks. His death was a tragic loss to all concerned.

Captain Grabowski first became acquainted with the NORTH SEA, I don't recall exactly but I think it was in 1965 or 1966. I do know that he entered into a written demise charter with the owner or the owner *pro haec vice* on July 19, 1967. This charter terminated and a new demise charter was executed on July 1, 1968. The last mentioned charter was in effect at the time of his death.

I think in each of those charters and in the charter prior to 1967, be it written or verbal, I think it was written but it is not in evidence, there is an implied warranty that this vessel was in all respects seaworthy for reasonable use under reasonable conditions in the crab fishing industry. I do not think the warranty was any greater than that. But, unlike the warranty owed by the owner of a vessel to a member of the crew, which is continuous in nature, the doctrine of *caveat emptor* applies with respect to all patent defects, but not to latent defects.

I think the evidence also establishes overwhelmingly that Captain Grabowski knew more about the condition of the NORTH SEA, its strength and it weaknesses, than any other person, and that he did not rely on an implied warranty of any sort or description, and with the knowl-

edge he had of the condition of this vessel he undertook repeated charters.

From the testimony which I credit and believe, and there is much testimony that could not be so characterized, I find that the NORTH SEA was subjected to unreasonable use under unreasonable conditions, as a result of which the vessel broke up in a storm which I cannot classify as catastrophic, that is in the sense that it was a storm which could not reasonably have been anticipated in that area at that time of year, but was a storm which was unusually severe, the most turbulent experienced during that particular season and for several years prior there—a whole gale with mountainous seas and winds gusting to hurricane force.

I have searched this record carefully, and I am simply unable to find any ground of liability on the part of either petitioner. In particular the Court is unable to find that there was any latent defect existing at the time of the charter of July 1, 1968 which proximately resulted in Captain Grabowski's death. I must dismiss the claim.

Mr. Holland, you may prepare findings to be presented to the Court on notice.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In the Matter of the Petition of NORTHERN FISHING & TRADING COMPANY, INC., a corporation, owners of the fishing vessel NORTH SEA, and ALEUTIAN KING CRAB, INC., a corporation, charterer of the fishing vessel NORTH SEA, for Exoneration from or Limitation of Liability, *Petitioners-Appellees,* v. SOPHIE M. GRABOWSKI, individually, as personal representative of the deceased, EDWIN T. GRABOWSKI, and as guardian of the estate of the minor children of EDWIN T. GRABOWSKI, *Claimant-Appellant.*	No. 71-2475 OPINION

[April 23, 1973]

Appeal from the United States District Court
for the Western District of Washington

Before: CARTER, CHOY and GOODWIN (Alfred T.), Circuit Judges.

JAMES M. CARTER, Circuit Judge:

This case arises from the loss of the wooden fishing vessel NORTH SEA off the southwest coast of Unimak Island, Alaska, on December 12, 1968. Captain Grabowski, the skipper, and two other crew members were drowned. The deck hand, Golodoff, survived.

Appellant Sophie M. Grabowski, the widow of the Captain, was the claimant, individually, and as the personal representative of Captain Grabowski, and as the guardian of their minor children.

The appellees, petitioners for exoneration from or limitation of liability, are Northern Fishing & Trading Company, Inc., the owners of the NORTH SEA, and Aleutian King Crab, Inc., the charterer of the NORTH SEA.

The Issues

Although appellant raises other contentions to some of which we shall later advert, we view the important issues to be these:

1. Does the evidence support Finding No. 20 that the loss of the vessel resulted from the factors set forth in Findings Nos. 16 through 19?

2. Does the evidence support Finding No. 20 that the claimant failed to establish by a preponderance of the evidence a breach of the warranty of seaworthiness implied in the charter to Captain Grabowski of July 1, 1968, or that unseaworthiness of said vessel was a proximate cause of his death?

3. Did the trial court properly place the burden of proof on the claimant, appellee? We affirm.

In 1967, Northern Fishing bareboat chartered the vessel to Captain Grabowski for a term from July 20, 1967, to April 30, 1968. On January 1, 1968, Northern Fishing again bareboat chartered the vessel to Aleutian for a term from January 1, 1968, to December 31, 1968.

On July 1, 1968, Aleutian sub-bareboat chartered the vessel to Captain Grabowski for the period of July 1, 1968, to April 30, 1969. Thus, at the time of the loss of the vessel, Aleutian had a bareboat charter from Northern Fishing, and Captain Grabowski had a sub-bareboat charter from Aleutian.

The only direct evidence as to the storm and the loss of the vessel were two depositions of the surviving crew member, Golodoff.

We summarize briefly the events leading to the loss of the vessel. It had been fishing for crab in Unimak Pass, off the southwestern coast of Unimak Island. The vessel had been returning for anchorage at night in either Akun or Trident Bay on the southwest side of Unimak Pass.

On December 11, 1968, the vessel moved its fishing gear to the slime banks about ten miles from Cape Sarichef, off the southwest coast of Unimak Island. After a day of fishing, adverse weather was encountered in the area of Cape Sarichef. The Captain elected to proceed for anchorage at Urilla Bay on the north central coast of Unimak Island. During the night and early morning the wind increased and swung around more out of the northwest, so that Urilla Bay no longer provided effective protection from the storm. The vessel left the Bay on December 12, proceeded northwesterly to deep water about seven or eight miles northwest of Cape Sarichef, then turned southwesterly "on a 'jogging' zigzag course." The storm had increased in volume, with winds from the west-northwest.

The trial court found that the storm was unusually severe, with turbulence not experienced during that particular season or for several years prior thereto. There was a full gale, with mountainous seas and winds of hurricane force:

The following five events preceded the loss of the vessel:

(1) Before the vessel left Urilla Bay, a water pipe broke in the engine room, partially flooding the bilge. The crew made emergency repairs.

(2) While proceeding southwesterly, the vessel took a sea which knocked off the forward starboard bulwark. In order to allow the crew to remove the debris, the Captain put his stern to the storm and proceeded toward Unimak Island. After the debris was removed, the Captain completed a 360° turn and again proceeded southwesterly.

(3) About an hour later another sea knocked off the false bridge in front of the pilot house. Again the vessel's stern was put to the storm and the debris removed.

(4) As the vessel started again to resume a southwesterly course, a monstrous sea entirely wiped out the pilot house. The steering controls were gone; an electrical short charged the hand rails to the engine room with electricity; and a break in the ammonia pipe system flooded the engine room with ammonia. The propelling engine quit and the vessel was a powerless hulk.

(5) An hour or so later, as the vessel took more water and sank lower in the sea, the crew attempted to launch the life raft and were swept away by the waves. Golodoff, who survived, and the body of Captain Grabowski, were found on the southwest coast of Unimak Island at Sennet Point.

We note that the loss of the vessel did not result from destruction or disintegration of the hull, but from the events above and the seas taken upon and into the vessel.

The Findings

The pertinent findings of the trial court were as follows:

"11. That in accordance with paragraph 15 of the admitted facts of the Pretrial Order, the only relationship between Northern Fishing & Trading Company, Inc. and Aleutian King Crab, Inc. on one hand and Captain Grabowski on the other was that created in the demise charters of the vessel NORTH SEA, and there was no employer-employee relationship between the aforesaid parties at any time.

12. That on December 12, 1968, the fishing vessel NORTH SEA was lost at sea off the coast of Unimak Island, Alaska in the vicinity of Cape Sarichef during a storm that was unusually severe, the turbulence of which had not been experienced during that particular season and for several years prior thereto. The said storm, which could reasonably have been anticipated at that time of year, was a full gale with mountainous seas and winds gusting to hurricane force.

• • •

15. That Edwin T. Grabowski had greater knowledge of the condition, strengths and weaknesses of the NORTH SEA than any other person and did not at any time rely on any warranty implied in the charter. That with such knowledge of the vessel he had undertaken repeated charters of the same.

16. That Captain Grabowski was an ambitious, courageous crab fisherman who had no fear of the sea. That during the period of charter he subjected the vessel to unreasonable use under extreme condi-

tions of weather and sea and without proper regard for his own safety or that of the vessel.

17. That Captain Grabowski could have fully bunkered his vessel by taking on additional fuel to the full capacity of her tanks at Dutch Harbor on December 9, 1968, but he did not do so.

18. That while in the vicinity of Urilia [sic] Bay on December 12, 1968, Captain Grabowski was of the opinion that the vessel did not have sufficient fuel to permit his taking protective action by 'jogging' or otherwise proceeding seaward into deep water in a direction where the actions of wind and sea would have presented less of a threat to the safety of the NORTH SEA.

19. That instead of navigating his vessel as set forth in the last preceding paragraph he proceeded into the area of Unimak Pass and through an area where the combined conditions of wind, sea and tide exposed the NORTH SEA to extra hazardous and more violent conditions, and subjected the vessel to the utmost peril.

20. That the loss of the NORTH SEA proximately resulted from the factors set forth in paragraphs 16 to 19, inclusive, and claimant has failed to establish by a preponderance of the evidence that breach of a warranty of seaworthiness implied in the charter of July 1, 1968, the charter in effect at the time of the loss of the NORTH SEA, or that unseaworthiness of said vessel was a proximate cause of the death of Captain Grabowski."

Discussion

A holder of a bareboat charter, who is the operator of the vessel so chartered, has a non-delegable duty to his employees to furnish a seaworthy vessel. *Reed v. Yaka*, 373 U.S. 410, 415 (1963). Such a person was Captain Grabowski, but this leads us nowhere, since his widow and personal representative is the claimant and no claims are before us against Grabowski's estate in behalf of the two crewmen who died.

"Whether a bareboat charter absolves owner from lia-

bility on its warranty of seaworthiness is a question we also reserved in *Guzman v. Pichirilo*, 369 U.S. 698, 700 (1962). We do not reach the question here." *Reed v. Yaka, supra*, p. 411, n.1.

Nor do we need to reach it here, since Finding No. 20 expressly assumes such an implied warranty existed in the charter of July 1, 1968, from Aleutian to Captain Grabowski.

In this case we have the customary standard for review. Findings of fact as to the cause of the accident, here the loss of the vessel, will not be set aside unless clearly erroneous. The evidence must be reviewed in the light most favorable to the prevailing party and that party must be given the benefit of all inferences that may reasonably be drawn from the evidence. *Sutherland v. Hudson Waterway Corp.* (9 Cir. No. 26,257—November 1, 1972) .... F.2d .....

I.

The Findings of Fact Were Not Clearly Erroneous

As to Findings Nos. 16 through 19, without detailing the evidence, we conclude that the findings were not clearly erroneous.

As to the matter of unseaworthiness, considered in Finding No. 20, we have heretofore detailed the events leading to the loss of the vessel.

The testimony of the sole surviving crew member, Golodoff, described these events. There is no indication in the record that the vessel was taking water by reason of rotting planks or teredo holes. After the wheel house and false bridge had been wiped out by a series of mountainous waves, the vessel continued to take seas which eventually resulted in an extreme list during the last two-hour period.

Appellant relies almost solely on the testimony of Captain A. F. Raynaud, who inspected the vessel some three years and ten months before the loss. Appellant cites only a portion of his testimony in her Appendix "B". That portion shows that Captain Raynaud examined only three or four planks. He noted some infestation in the horn timber and the lowest strake. But various parts of Raynaud's testi-

mony were ignored by appellant, including his comment that the rot in the keel did not appear to be too extensive; that he did not make any inspection above the main deck; that the keel was essentially sound; that he examined only two or three planks on the starboard side out of the eighteen or twenty-four; that his notes indicated only "scattered bug holes"; that the stem was in good, sound condition and that he had no way of knowing about the major structural members under the deck.

There was other evidence in the record. Some crew members observed defects and others observed none. The same is true as to the witnesses who were not members of the crew. Suffice it to say that although the evidence of the vessel's condition was in conflict, it was sufficient to justify our conclusion that the trial court's findings were not clearly erroneous.

II.

The Trial Court Applied the Proper Burden of Proof to the Claimant

By necessary implication, Finding No. 20 placed the burden of proof on the claimant to prove breach of the warranty of seaworthiness, and that unseaworthiness was the proximate cause of the loss of the vessel. The fact that this conclusion of law appears in a finding of fact does not change the situation.

Appellant cites only In re *American Dredging Company* (3 Cir. 1956) 235 F.2d 618, rev'd on other grounds sub nom. *Kernan v. American Dredging Co.*, 355 U.S. 426 (1958). There, in a proceeding for exoneration, the Circuit stated that the district court "made findings of fact and concluded the petitioner [for exoneration] had sustained its burden of establishing that both it [the owner] and the master and crew of the tug were free from negligence and that the tug and tow were not unseaworthy." 235 F.2d at p. 619. The Circuit cited the district court's decision, In re *American Dredging Co.* (E.D. Pa. 1956) 141 F. Supp. 582, and held that the findings of fact and legal conclusions were correct. No cases were cited, nor were any cases cited by the district court on the question of burden of proof.

Walston v. Lambertsen (9 Cir. 1965) 349 F.2d 660, 663, cert. denied, 382 U.S. 980 (1966), states: "In the admiralty proceeding in which a shipowner seeks to exonerate himself from liability or to limit his liability, the burden of proving negligence or unseaworthiness rests upon the claimant." We could well stop at this point and rest upon the above holding except for the fact that the two cases cited in support of the statement are not exoneration or limitation of liability cases.[1]

Appellees quoted the following from *Gilmore & Black, The Law of Admiralty*, 705, n.106 (1957):

> "While the shipowner must prove his freedom from privity or knowledge, the burden of proof as to negligence or other ground on which liability is based is of course on the libellants. See 3 Benedict. Admiralty § 489 (6th ed. 1940); Robinson. Admiralty 942 (1939).
>
> • • •
>
> There is indeed language in the opinions to justify the commentator's statement. It is believed that the rule should be as in the limitation cases: burden on the libellant to show negligence or fault; burden on the owner to show his (personal) freedom from 'design or neglect.'"

Benedict states that the burden is on the libellant [claimant] to prove negligence or other ground on which liability is based. 3 *Benedict, The Law of American Admiralty*, § 524, pp. 557-58, and § 526, p. 560.

1 *Edelman, Maritime Injury and Death* 619 (1960) flatly states: "(1) the claimant has the burden of proving negligence or unseaworthiness; (1) then the shipowner must prove the absence of privity or knowledge." (Footnotes omitted.)

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1. The first case cited, *Lieberman v. Matson Navigation Co.* (9 Cir. 1962) 300 F.2d 661, was an action under the Jones Act and for unseaworthiness, where the burden of proving negligence or unseaworthiness was properly placed on the seaman. The second case cited, *Ramos v. Matson Navigation Co.* (9 Cir. 1963) 316 F.2d 128, was an action for damages, based on unseaworthiness, and negligence under the Jones Act, and for maintenance and care, where again the burden of proof was properly placed upon the seaman. Accordingly, we must look elsewhere for authority for the proposition stated in *Walston, supra.*

One of the cases *Edelman* cites for the statement is *The 84-II* (2 Cir. 1923). 296 F. 427, 432, cert. den. sub nom. *Randolph v. Bouker Contr. Co.*, 264 U.S. 596 (1924), which states:

> "The whole doctrine of limitations of liability presupposes that a liability exists which is to be limited. If no liability exists there is nothing to limit. And in a proceeding to limit liability two duties are imposed upon the court. The first is to ascertain whether any liability exists. If it is found to exist the second duty arises, which is to ascertain whether the loss or damage was occasioned or incurred without the 'privity or knowledge' of the owner of the ship. If no liability is found to exist, the absence of all liability is to be decreed, and there the matter ends. If, on the other hand, liability is found and loss or damage is shown, and was not occasioned or incurred with 'privity or knowledge' of the shipowner, the limitation of liability should be decreed. See the decision of this court in The Rambler, 290 Fed. 791, 1923 A.-M. C. 618. Upon the issue of negligence, the claimant has the affirmative (The Titanic, 225 Fed. 747, 748, 141 C. C. A. 19), and if negligence is found the petitioner has the burden of proof upon the further issue of the petitioner's privity and knowledge as was held by this court in Re Reichert, 251 Fed. 214, 217, 163 C. C. A. 370."

The 84H, supra, is a leading case for the proposition that in an exoneration or limitation case the burden is on the claimant to prove negligence or unseaworthiness. It has been followed in numerous cases: *Binstock v. Friedman* (2 Cir. 1964) 330 F.2d 267, 268; *Southern Pacific Co. v. United States* (2 Cir. 1934) 72 F.2d 212, 215; In re *Pennsylvania R. Co.* (2 Cir. 1931) 48 F.2d 559, 563, cert. den. sub nom. *Long-Beach-on-the-Ocean v. Pennsylvania R. Co.*, 284 U.S. 640 (1931); In re *Trawler Snoopy, Inc.* (S.D. Me. 1967) 268 F. Supp. 951, 953; In re *Marina Mercante Nicaraguense S.A.* (S.D.N.Y. 1965) 248 F. Supp. 15, 19, modif., 364 F.2d 118 (2 Cir. 1966), cert. den., 385 U.S. 1005 (1967); *The Suduffco* (S.D.N.Y. 1929) 33 F.2d 775, 776. See *Commercial Molasses Corp. v. New York Tank Barge Corp.*, 314 U.S. 104, 108, 110 (1941).

There is presented here no issue as to the proper order of proof. The appellant, as claimant, had the benefit of the implied warranty of seaworthiness. But she still had the ultimate burden of proof, after the conclusion of the testimony, to show a breach of that warranty or that unseaworthiness of the vessel was the proximate cause of the loss of the vessel. This she failed to do.

We conclude that the trial court applied the proper burden of proof.

III.

Other Contentions

We have held not to be clearly erroneous Finding No. 20, to the effect that the claimant had not sustained her burden of proof (1) that there was a breach of the implied warranty of unseaworthiness, and (2) that unseaworthiness of the vessel was a proximate cause of the death of Captain Grabowski. We have held that the court properly placed the burden of proof on the claimant.

Accordingly, appellant's other contentions below, though interesting, have no merit:

(1) The statement in Finding No. 9, that the charter to Captain Grabowski included an agreement to hold the petitioner harmless against any claim arising out of his operation of the vessel.

(2) Finding No. 15, that Captain Grabowski did not at any time rely on any warranty implied in the charter. See *Clarke S.S. Co. v. Munson S.S. Line* (E.D.N.Y. 1932) 59 F.2d 423, 427, aff'd, 64 F.2d 1011 (2 Cir. 1933) (per curiam), holding the charterer may waive the terms of a charter or a breach thereof.

(3) The contention that the trial court erroneously relied on the doctrine of assumption of risk.

(4) The reference in the trial court's oral decision (but not in his formal findings and conclusions) ". . . that the doctrine of caveat emptor applies with respect to all patent defects but not to latent defects." [This apparently in connection with the bareboat charter to Captain Grabowski.] See *Sanford & Brooks Co. v. Columbia Dredging Co.*, (4

Cir. 1910) 177 F. 878, 882.

(5) The reliance on *Harris v. Walker* (5 Cir. 1964) 335 F.2d 185, cert. den., 370 U.S. 930, which we do not find apposite.

The judgment is affirmed.

46 § 183 VESSEL OWNER'S LIABILITY

§ 183. Amount of liability; loss of life or bodily injury; privity imputed to owner; "seagoing vessel"

(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-461

SOPHIE M. GRABOWSKI, individually, as personal representative of the deceased, EDWIN T. GRABOWSKI, and as guardian of the estate of the minor children of EDWIN T. GRABOWSKI,
Petitioner,

v.

NORTHERN FISHING & TRADING COMPANY, INC., a corporation, owners of the fishing vessel NORTH SEA, and ALEUTIAN KING CRAB, INC., a corporation, charterer of the fishing vessel NORTH SEA, who herein petitions for exoneration from or limitation of liability,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

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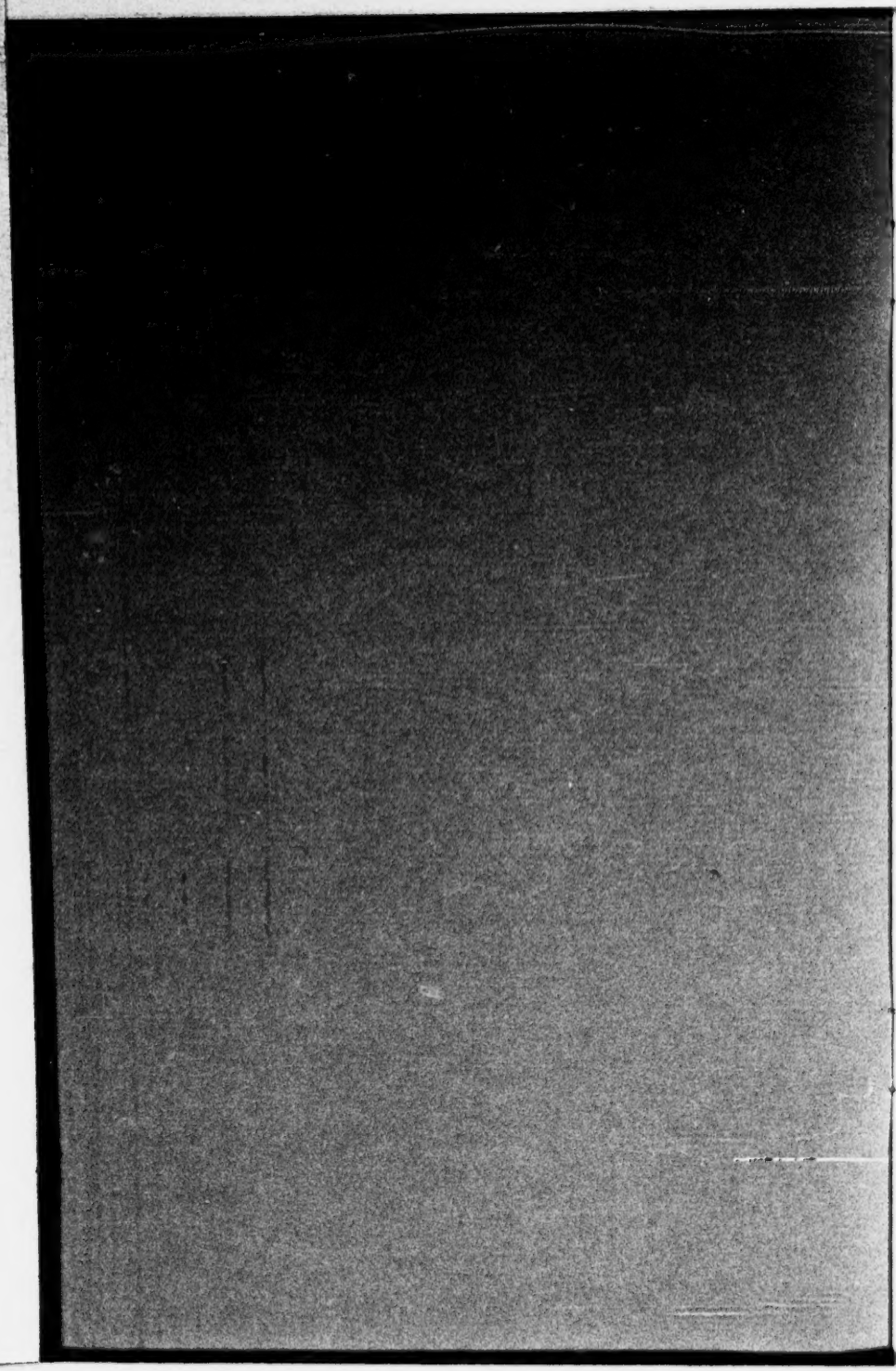

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IN THE

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No.....

SOPHIE M. GRABOWSKI, individually, as personal representative of the deceased, EDWIN T. GRABOWSKI, and as guardian of the estate of the minor children of EDWIN T. GRABOWSKI,

Petitioner,

v.

NORTHERN FISHING & TRADING COMPANY, INC., a corporation, owners of the fishing vessel NORTH SEA, and ALEUTIAN KING CRAB, INC., a corporation, charterer of the fishing vessel NORTH SEA, who herein petitions for exoneration from or limitation of liability,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

ARGUMENT

A. The Claimed Conflict Between Circuits Has Heretofore Been Considered by This Court—and Rejected

The Petitioner summarizes the alleged conflicts between circuits as follows (Petitioner's Brief page 11 and page 13):

> "A. The Rule in the 3d and 5th Circuits is that if the Weather Could Reasonably Have Been Anticipated the Vessel Must be Strong and Staunch Enough to Weather the Storm, or it Is Presumed Unseaworthy as a Matter of Law."
>
> • • •
>
> "B. The Rule in the 9th Circuit Unlike the 3d and 5th

> Circuits Is That Affirmative Evidence of Unseaworthiness Must First Be Established and Then the Claimant May Benefit From the Inference to Establish Causation."

In discussing the rule in the 5th Circuit, the petitioner relies upon *Walker v. Harris*, 335 F.2d 185 (5th Cir. 1964) cert. den. 379 U.S. 930, 85 S. Ct. 326, 13 L. Ed. 2d 342. In discussing the rule in the 9th Circuit, the petitioner relies upon *Walston v. Lambertsen*, 349 F.2d 660 (9th Cir. 1965) cert. denied 382 U.S. 980, 86 S. Ct. 553, 15 L. Ed. 2d 470 (1966).

It is to be noted particularly that certiorari was denied in the *Walston* case. The issue presented to this Court in that case eight years ago was whether there was a conflict between *Walston v. Lambertsen, supra,* and *Walker v. Harris, supra,* with respect to the treatment by the respective circuits of the rule of presumption of unseaworthiness. THIS IS THE IDENTICAL ISSUE PRESENTED TO THIS COURT IN THE CASE AT BAR.

In formulating the issue to be presented to this Court in 1965, the petitioner in *Walston* stated in her petition for certiorari (page 6):

> "REASONS FOR GRANTING THE WRIT
>
> "1. The decisions of the Court below in the instant case are directly in conflict with the decision of the United States Court of Appeals for the Fifth Circuit in *Walker v. Harris*, 335 F.2d 185 (1964); cert. den. 379 U.S. 930, 85 S. Ct. 326, 13 L. Ed. 2d 342."

The above quotation is taken from the "Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit" on file in this court being Docket No. 717.

The *Walston* petition was denied by this court on January 17, 1966.

B. There Is Still No Conflict in Circuits

In claiming a conflict exists between the 3rd and 5th Circuits on the one hand and the 9th Circuit on the other, the petitioner relies on only three leading cases. The following critical analysis of each will show that they are in accord with this Court's acknowledgment that the mere fact of loss of a vessel is not ipso facto proof of unseaworthiness.

In *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 4 L. Ed. 2d 941, 80 S. Ct. 926, 1960 A.M.C. 1503 (1960), is found the following:

> ". . . The standard is not perfection, but reasonable fitness; not a ship that will weather *every conceivable storm* or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service. *Boudoin v. Lykes Bros. S.S. Co.*, 348 U.S. 336, 99 L. Ed. 354, 75 S. Ct. 382." 362 U.S. at 550 (emphasis ours).

THIRD CIRCUIT

In the Third Circuit petitioner cites only the case of *Eastern Gas & Fuel Associates v. Martin Marine Transit Company*, 190 F.2d 394 (3d Cir. 1951). This case dealt with a suit by the cargo owner against the carrier under a charter party. The claim developed out of the turning over of a barge under conditions which were described as a moderate gale. The witnesses testified, however, that the weather was not unusual and it was of the type which one could expect to encounter at that time of year. The court therefore concluded that the lower court's finding of the capsizing having been because of a storm constituting a

peril of the sea was erroneous. In applying the presumption of unseaworthiness, the court stated:

> "But the logical inference of unseaworthiness which follows from the unexplained sinking of a vessel in *weather she should be able to withstand* suffices to discharge that burden unless and until the carrier shall affirmatively show exculpatory circumstances." (Emphasis ours)

Again, in concluding the court stated:

> "It is sufficient that libelant was entitled to prevail on the basis of the inference of unseaworthiness which should have been drawn from the unexplained sinking in weather *the vessel should have been able to withstand.*" (Emphasis ours).

Turning to the case at bar, while some witnesses may have said that extremely strong winds and/or storms were to be anticipated in the Bering Sea area at that time of year, no one testified nor could the court have properly concluded that a fishing vessel would have to be constructed to withstand hurricane forces which, from the weather reports emanating at the time of the casualty, were expected up to gusts of 180 miles per hours. In short, that portion of the presumption based on a "calm sea" or even a sea which the vessel should "be able to withstand" simply does not here exist.

FIFTH CIRCUIT

The leading case in the Fifth Circuit is *Walker v. Harris*, 335 F.2d 185 (5th Cir. 1964), cert. den. 379 U.S. 930, 85 S. Ct. 326, 13 L. Ed. 2d 342. The sinking of the tug "*Ralph E. Havens*" was found by the trial court to have been the result of a severe and unexpected storm and the petition for exoneration was therefore granted, the court stating

that exoneration from liability is allowed when the loss is not caused by unseaworthiness or negligence.

After receiving the available weather reports, the captain, who had prior experience in these waters, exercised his judgment and proceeded on course along the Florida Coast. The weather worsened rapidly and as a result the vessel took on large amounts of water and eventually sank. The court stated that when a storm is relied upon to explain the sinking of the vessel, it must be shown to have been of "'extraordinary intensity," which term however is concededly a relative matter. The court concluded that for a vessel of the size in question, the waves encountered from 12 to 13 feet constituted such a storm. The court was not convinced of the claimed inadequacy of various equipment aboard the vessel nor the master's negligence in navigation. Accordingly, the petition for exoneration was granted.

The Fifth Circuit, in reversing the trial court, commenced by claiming it would do so without rejecting as clearly erroneous the trial court's findings of fact. The court then reviewed in some detail the graphic facts of the incident, concluding that wind forces of 33 to 36 miles an hour and seas from 5 to 12 feet in height demonstrated only relative low velocity of wind and limited height of sea. The trial court's holding is paraphrased as stating that a vessel incapable of withstanding winds of this relatively low velocity in seas of limited height is nevertheless seaworthy. The appellate court said that this result can be justified on only one of two grounds, namely (1) that the natural forces were so severe and unpredictable for the time and place that the prudent shipowner had no reason

to anticipate their occurrence, or (2) assuming a duty to anticipate this weather, some new and wholly predictable act intervened which made it reasonably impossible for the crew to extricate themselves. The court found that neither of these two conditions was established by the record.

The court concluded that the real question in the case is that of whether or not the seas of the kind actually encountered were reasonably to be anticipated. Relied upon was the testimony of the shipowner's witness who, with experience in the area, stated that there was nothing unusual about a 35 miles an hour wind in connection with northwesters, that northwesters at this time of year in that area were not uncommon, and that any vessel operating in the area should be reasonably fit to overcome such a northwester, or in other words, if she could not do so she would be unseaworthy. The court then referred to *R. T. Jones Lumber v. Roen Steamship Co.*, 270 F.2d 456 (2 Cir. 1959), 1960 A.M.C. 46, where the storm was not an unusual event but which could reasonably be anticipated and provided against; the *Petition of Moore McCormack Lines, Inc.*, 164 F. Supp. 198 (S.D.N.Y., 1958), 1958 A.M.C. 1497, where the weather encountered was to be expected on the voyage; and *Eastern Gas and Fuel Associates v. Martin Marine Transit Company*, 190 F.2d 394 (3d Cir. 1951), 1951 A.M.C. 1518, that the weather must be irresistible, overwhelming, and extraordinary to be a good exception.

Referring to the cases relied upon by the trial judge, the court noted the inadvisability of referring to insurance cases for guidance. The court stated:

> "More important, insurance cases which turn on the law's quest for the contractors' intention are poor analogies in assaying the 'public' duties imposed by

> law on ships and shipowners for the protection of people and property."

The court then referred to the application of the "familiar doctrine so often invoked" where vessels sink in calm waters, that the sinking under circumstances which the vessel must reasonably anticipate and overcome is the best proof of, and makes out the classic case of, unseaworthiness. As support for this "familiar doctrine" the court referred to the collected cases to be found in *Tropical Marine Products v. Birmingham Fire Insurance Co.*, (5 Cir. 1957), 1957 A.M.C. 1946, 1948, 1949, 247 F.2d 116, 118. The six cases collected there, however, are, without exception, those dealing with rights under an insurance policy or under a cargo bill of lading (a contract). Generally, it shows that the carrier, libelant, or claimant, is required to establish that the cause of the loss was due to peril insured against.

The court then turned to the items of alleged *specific* unseaworthiness of the *Ralph E. Havens, i.e.*, the single strength glass pilot house panes and the various pumps aboard. It found the trial court in error for concluding that the pumps and window panes were adequate. On these points the court stated (p. 193):

> "But none of these things or conditions was unknown, unexpected, or unpredictable. Indeed, it was just such things which made the Tug *reasonably unfit* for these waters in this season. Forces and conditions which she had the duty of anticipating cannot amount to an intervening and new cause to excuse the disastrous result." (Emphasis ours)

In addition to the above findings of unseaworthiness, the court went into great detail on the condition of the lifeboat

and concluded that it, too, and therefore the Tug, was unseaworthy.

From the foregoing it is clear that the court did not find liability based on a *presumption* of unseaworthiness but rather on specific findings of unseaworthiness. This is exactly what the Ninth Circuit in *Walston, supra,* found to be a necessary element before the presumption could be applied to an otherwise unexplained disappearance.

It is one thing to say that a vessel must be prepared for and overcome weather conditions which can be anticipated in a given area when vessels generally of that size routinely transit the area. It is another thing for the *"North Sea,"* a small fishing vessel, to be caught on the open sea with predicted winds of from 40 to 60 knots with wind gusts in certain places to be triple this amount (or up to 180 knots). It can be stated without fear of contradiction that no fishing vessel of the stated size was ever constructed to withstand such catastrophic forces.

The area of our casualty, the Bering Sea, is known as the "birthplace of all storms." More than one of the fishermen witnesses testified about their prior experiences with winds in this area in the vicinity of 100 miles per hour. In all such instances, however, the prudent course was followed of seeking shelter which the deceased here originally sought to do.

In summary on the *Harris* case, it appears that the Fifth Circuit found:

(1) The weather was "moderate" for a vessel of this size,

(2) The weather was reasonably to be anticipated,

(3) The vessel was unseaworthy not by presumption but because of:

A. Inadequate pump,

B. The window panes were ordinary (and weak),

C. The lifeboat was unseaworthy.

This can hardly be the case supporting the claimed presumption of unseaworthiness when a vessel disappears without explanation in calm waters. As such, the opinion cannot be said to be in conflict with the holdings of the Ninth Circuits in *Walston, supra.*

NINTH CIRCUIT

In the *Walston* case, *supra*, the Ninth Circuit court found that the actual cause of the sinking of the vessel could not be proved. The vessel disappeared on a day when the breeze was light, the seas were calm, the weather was clear and the visibility was six miles. The court stated in part (p. 662):

> "The appellant contends that the district court erroneously failed to apply the doctrine of *res ipsa loquitur* to her advantage. Our court has held that if a claimant establishes that a vessel is unseaworthy, the trial court may presume that the unseaworthiness was the proximate cause of the sinking, otherwise unexplained, of a vessel in calm seas."

The court then referred to decisions in the Fifth, Sixth, Seventh and Ninth Circuits and then stated (p. 662):

> "A review of the opinions in these cases and all others which might seem somewhat analogous to the case at bar makes it clear that the presumption which appellant would apply has been indulged only when the claimant has been able to establish to the satisfaction of the trial court that the vessel was unseaworthy at the time it departed on its last voyage. The sea itself

contains many hazards, and an inference of liability of the shipowner for the mysterious loss of his vessel should not be lightly drawn. The court below obviously and properly believed that there could be no foundation for the inference absent satisfactory proof of an unseaworthy condition which might reasonably be expected to relate directly to the sinking of the vessel."

Another Circuit Court with extensive admiralty experience also had occasion to consider this same rule of presumption of unseaworthiness and in so doing indicated its belief that the Fifth and Ninth Circuits both follow the same rule. *In re Marine Sulphur Queen*, 460 F.2d 89, 99, 1972 A.M.C. 1122, 1133 (2 Cir. 1972), Judge Anderson stated:

> "It is settled that when a vessel disappears in expectable weather under otherwise unknown circumstances, proof by the plaintiffs of some element of unseaworthiness will permit the trier of fact to infer that the unseaworthiness was the proximate cause of the loss. *Walston v. Lambertsen*, 349 F.(2d) 660, 662 (9 Cir. 1965), cert. denied, 382 U.S. 980, 86 S. Ct. 553, 15 L. Ed. 2d 470 (1966) (dicta); *Admiral Towing Co. v. Woolen*, 290 F.(2d) 641, 649-651 (9 Cir. 1961); *Roth v. Bird*, 239 F.(2d) 257, 262 (5 Cir. 1956); *The Cleveco*, 154 F.(2d) 605, 615 (2 Cir. 1946). Although the lower court did not clearly state that it drew this inference of causation, we hold that its resolution of the liability of the owners to the Death Claimants subsumes such an inference. While the lower court may, to some extent, have relied on inappropriate authority for such an inference, we see nothing in the lower court's opinion inconsistent with the conclusion that it drew the inference that the several aspects of unseaworthiness were, in their totality, the proximate cause of the Queen's disappearance, cf. *Leather's Best, Inc. v. SS Mormaclynx*, 451 F.(2d) 800, 813 (2 Cir. 1971)."

At least one District Court in the Fifth Circuit has also expressed its belief that the Fifth Circuit and Ninth Cir-

cuit rules are not in conflict. In *Travelers Indemnity Co. v. Gulf Weighing Corp.*, 352 F. Supp. 335, (E.D. La. 1972), the court followed the rule of the Fifth Circuit and, in addition, cited with approval the *Walston* case, *supra.*

CONCLUSION

We believe that the key to the petitioner's sincere but incorrect belief that there is a conflict between the Circuits on the "presumption of unseaworthiness rule" is her failure to observe the use by the various courts of the single word "operating."

A distinct line of delineation must be drawn between the following two evidentiary propositions:

1. Evidence that the storm was unusually severe, the turbulence of which had not been experienced during that particular season and for several years prior thereto and that said storm, which could reasonably have been anticipated at that time of year, was a full gale with mountainous seas and winds gusting to hurricane force. (See Finding of Fact No. 12).

2. Evidence that it is intended to operate a *particular* vessel in an area and at a time when it is reasonable to anticipate that the vessel and/or its condition is inadequate to withstand the weather which is to be anticipated.

Neither the Fifth nor Ninth Circuits would require a shipowner to provide a vessel capable of withstanding storms of any conceivable size and strength. What is essential however, is that the vessel be able to withstand normal *operating* conditions.

It is respectfully submitted therefore that there does not exist a conflict between Circuits, that this particular area of maritime law is clear and well-defined throughout the land and that a review by this honorable Court is unnecessary at the present time.

Respectfully submitted,

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BOGLE, GATES, DOBRIN,
WAKEFIELD & LONG

DONALD P. MARINKOVICH of
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Counsel for Respondent

MOTION FILED

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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-461

SOPHIE M. GRABOWSKI, individually, as personal representative of the deceased, EDWIN T. GRABOWSKI, and as guardian of the estate of the minor children of EDWIN T. GRABOWSKI,

Petitioner,

v.

NORTHERN FISHING & TRADING COMPANY, INC., a corporation, owners of the fishing vessel NORTH SEA, and ALEUTIAN KING CRAB, INC., a corporation, charterer of the fishing vessel NORTH SEA, who herein petitions for exoneration from or limitation of liability,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF AND STATEMENT OF INTEREST OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA FOR LEAVE TO INTERVENE AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

BRIEF OF AMICUS CURIAE

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MOTION FOR LEAVE TO FILE BRIEF AND STATEMENT OF INTEREST OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA FOR LEAVE TO INTERVENE AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

BRIEF OF AMICUS CURIAE

THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA

TO: THE HONORABLE JUSTICES OF THE UNITED STATES SUPREME COURT

The Association of Trial Lawyers of America moves this Honorable Court for leave to file the attached brief in support of the position of the petitioner. Consent has been sought from all parties. Counsel for the petitioner has given his assent. Counsel for the defendants respondents do not assent.

The Association of Trial Lawyers of America is a national bar association whose membership exceeds 25,000 lawyers primarily engaged in the practice of law on behalf of plaintiffs in personal injury litigation. The admiralty section of this association includes most of the attorneys who specialize in the maritime personal injury law on behalf of plaintiffs. These attorneys represent seamen, longshoremen and other maritime workers who are engaged in the hazardous seafaring industry.

This Association, its members, and the injured claimants they represent, are directly affected by the rules relative to the burden of proof and the inferences and presumptions to aid the claimant on that issue, in injury and death claims when the issue is unseaworthiness of the vessel or equipment.

It is essential that those rules be uniform throughout the circuits and therefore, this court should resolve and declare the rules in admirality on the issue of unseaworthiness as they relate to the burden of proof and the use of inferences and presumptions in aid thereof, available to the injured seaman.

Therefore, this Association is vitally concerned with this litigation, not only in the instant case, but also, for the effect the ultimate disposition of this case will have on similar claims now existing and that will arise within the Ninth Circuit and the circuits that have not yet ruled upon the issues.

Because the final resolution of the legal issues in this case will materially affect and thereafter control the outcome of pending and future claims of seamen, it is of substantial importance to maritime workers who are or may

be injured or die, to the maritime industry, and to the admiralty bar, that this court resolve the issues raised in the petition for certiorari.

For all of the foregoing reasons, it is respectfully prayed that this Honorable Court accept this brief of amicus curiae.

The Association of Trial Lawyers of America
By ARTHUR J. MANDELL, Chairman
Amicus Curiae Committee, and
JOSEPH PETER MYERS of Counsel

BRIEF OF AMICUS CURIAE

Introductory Statement

The petitioner herein seeks review of the decision of the Courts below so that she individually and in her representative capacity may obtain compensatory damages for the wrongful death of her husband. This brief in support of the petition for a writ of certiorari is filed because it is imperative that there be a uniform rule stating the burden of proof in admiralty cases involving claims for injury or death based upon unseaworthiness. And it is equally imperative that the law so stated reflects and incorporates the historical compassion of Courts in admiralty for those who risk their lives on the seas.

The petition sets forth an accurate statement of the case, the proceedings below, and relevant facts. In order to create no additional burden, amicus curiae respectfully declines to repeat or re-summarize the facts of the instant case or the nature of the proceedings below.

The petitioner states that the United States Court of Appeals for the Ninth Circuit decided the instant case on the question of burden of proof. Amicus curiae concurs in that

interpretation of the opinion below. Although that Court devoted a substantial portion of its opinion to the question of whether certain findings of fact were clearly erroneous, it is apparent that failure to find "clear error" was dependent upon the Circuit Court's conclusion on the issue of which party had the burden of proof of those facts. And, further, many of the factual findings were irrelevant to the fundamental issue of seaworthiness.

BASIS FOR GRANTING A WRIT OF CERTIORARI

Historically, the Burden of Proof on the Issue of Seaworthiness Was Applied to the Owner of a Vessel in All Cases. The Opinion of the Court Below Is, Therefore, at Variance Not Only With Other Circuits, But Also With Established Principles Announced by This Court

Historically, the right of a seaman to recover damages in an action for injury caused by the unseaworthiness of a vessel or its appliances was granted at a time when the "warranty" of seaworthiness, and the shipowner's duties under it, were absolute. Thus, later cases which have appeared to limit or restrict absolute liability or limit the standards of proof on the part of the shipowner where a loss of cargo is concerned, cannot and should not limit the rights of those making claims for personal injury or death based upon the unseaworthiness of a vessel.

In *The Edwin I. Morrison,* 153 U.S. 199, 38 L. Ed. 688, 14 S.Ct. 823 (1894) the Court dealt with a loss of cargo, and set forth the historical basis for the imposition of a warranty of seaworthiness on the owner of a vessel. The Court cited ancient authorities for the principle that the owner was under an absolute duty to provide a seaworthy vessel. With regard to the burden of proof, on which issue

this Court reversed the District Court, the Court stated (153 U.S. at 215):

> "The obligation rested on the owners to make such inspection as would ascertain that the caps and plates were secure. Their warranty that the vessel was seaworthy in fact 'did not depend on their knowledge or ignorance, their care or negligence' the burden was upon them to show seaworthiness, and if they did not do so, they failed to sustain that burden . . . "

In *The Southwark*, 191 U.S. 1, 48 L. Ed. 65, 24 S.Ct. 1 (1903), another cargo case, the Court held that the burden of proof was upon the shipowner to show an exercise of due diligence to provide a seaworthy vessel and rejected the argument that Congress, in seeking to prevent some of the harshness of the rule of absolute liability on the part of the owner by enacting the Harter Act, had also restricted the burden of proof. The Court stated (191 U.S. at 15-16):

> "The burden was upon the owner to show, by making proper and reasonable tests, that the vessel was seaworthy and in fit condition to receive and transport the cargo undertaken to be carried; and if, by the failure to adopt such tests and to furnish such proofs, the question of the ship's efficiency is left in doubt, that doubt must be resolved against the shipowner, and in favor of the shipper. In other words, the vessel owner has not sustained the burden cast upon him to establish the fact that he has used due diligence to furnish a seaworthy vessel . . . "

These early cases, and the cases cited therein, clearly demonstrate the nature of the burden of proof on the issue of seaworthiness imposed upon the shipowner. It is important to note that this Court has consistently refused to limit or restrict that burden of proof in the absence of express legislation.

The use of the doctrine of unseaworthiness by injured seamen has a long history. In 1903, in *The Osceola,* 189 U.S. 159, 47 L. Ed. 760, 23 S.Ct. 483 (1902) Mr. Justice Brown stated, after a lengthy review of the English and American cases holding a vessel liable in admiralty for personal injuries received on account of unseaworthiness, the following (189 U.S. at 174):

> "Upon a full review, however, of English and American authorities upon these questions, we think the law may be considered as settled upon the following propositions:
>
> "* * * 2. That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship."

It is interesting to note that in *The Osceola,* this Court specifically rejected the European Civil Codes which limited the right to base a seaman's claim on the issue of unseaworthiness.

The Osceola was relied upon by this Court in *Carlisle Packing Co. v. Sandanger,* 259 U.S. 255, 66 L. Ed. 927, 42 S.Ct. 475 (1922), and the rule was again stated that the injured seaman had an action in admiralty for injuries received as a result of the unseaworthiness of a vessel or its equipment. And, even more important to the issues in the instant case, Justice Brown carefully distinguished between the nature of actions for injury founded upon negligence and actions founded upon the unseaworthiness of a vessel or its equipment. It is the contention of amicus curiae that the failure to carefully separate the nature of such actions at the trial level may well have led to the erroneous

conclusions regarding the burden of proof on the issue of seaworthiness made by the Ninth Circuit in the instant case. Merely because the typical suit filed by an injured seaman or his personal representative is founded on three causes of action—essentially the historical ones for maintenance and cure, negligence (Jones Act), and unseaworthiness—should not mean that the burden of proof is to be lumped together on all issues. The tendency of the Ninth Circuit, and even the commentators relied upon by it, to state that the burden of proof in cases of negligence *and* unseaworthiness is on the claimant, is to ignore the very different origins and development of the two theories of liability. In *Mitchell v. Trawler Racer,* 362 U.S. 539, 4 L. Ed. 2d 941, 80 S.Ct. 926 (1960) the majority opinion announced by Mr. Justice Stewart, 362 U.S. at 546-548, set forth the historical differences between these theories, and the separate opinion of Justices Frankfurter, Harlan and Whittaker, 362 U.S. at 556-568 does so as well. Regardless of the result, it is clear that that decision recognizes that different rules and burdens apply in actions founded on the separate theoretical bases.

In *Seas Shipping Company, Inc. v. Sieracki,* 328 U.S. 85, 90 L. Ed. 1099, 66 S.Ct. 872 (1946) this Court again recognized the liability of an owner for indemnification of a seaman for an injury caused by the unseaworthiness of a vessel, and stated the public policy in favor of the absolute liability of a shipowner for such injury in language clearly prophetic of the emergence of doctrines of strict liability being applied to civil actions generally, including the policy of allocation and distribution to insurers and commerce generally of the social costs of injury to seamen.

In *Commercial Molasses Corp. v. N.Y. Tank Barge*

Corp., 314 U.S. 104, 86 L. Ed. 89, 62 S.Ct. 156 (1941) this Court set forth distinct rules regarding the burden of proof to be applied in cases involving cargo loss, the distinction being made between common carriers and private carriers. That distinction was based on a recognition that the common carrier agrees, by its status, to be not only a bailee but an insurer of cargo which it carries, while a private carrier is free to regulate mutual rights and responsibilities with shippers of goods by contract.

The *Commercial Molasses* case did not deal with the question of seaworthiness or the burden of proof in cases involving personal injury or death of a seaman. It should be obvious, and it is clearly the thrust of those cases applying the doctrine of unseaworthiness to claims for personal injury or death, that the consensual nature of the agreement between a shipowner and shipper of goods is not the true foundation for claims for injury or death. The policy of the cases is clearly that the obligations of providing a seaworthy vessel, and proving it to be so, are placed upon the shipowner because of the enormous imbalance in relative position of the parties and the inability of the seaman to protect himself by examining the vessel for unseaworthiness or effectively providing some means, such as insurance, for spreading his personal risk of loss. *Seas Shipping Co. v. Sieracki, supra,* 328 U.S. at 95.

And, it would be absurd indeed to assume that a claim for personal injury or death of a seaman based upon the unseaworthiness of a vessel should have a different result depending upon the status of the vessel as that of a contract carrier or a private carrier. The commercial enterprise which chooses to bear added risk and insure itself therefor by choosing a private carrier to ship its cargo rath-

er than a common carrier is simply not equivalent to the seaman selecting a vessel upon which he may find employment.

It is the position of amicus curiae that the effective limitation of liability in *Commercial Molasses*, by the creation of distinct rules on the burden of proof in actions against private carriers based upon the unseaworthiness of a vessel, is totally inappropriate to claims for personal injury or death, and inconsistent with the recognition of the seaworthiness doctrine as an appropriate one upon which to base claims for injury or death.

Petitioner indicates (petition for writ of certiorari, pages 9-10) that the facts of the instant case are sufficient to sustain any burden of proof which might be placed on her by an application of the private carrier doctrine set forth in *Commercial Molasses*. It is the position of amicus curiae that, regardless of the application in the instant case of inferences and presumptions arising from the specific facts of the loss of the *North Sea* which would protect petitioner, this Court should not adopt a standard so inconsistent with the history of the protection afforded all injured seamen by the unseaworthiness doctrine. If, however, such a change in the law is to be created, this Court should grant certiorari in this case in order to provide uniformity and understanding of that uniformity in the law.

THERE IS A CONFLICT AMONG THE CIRCUITS ON THE BURDEN OF PROOF AND THE NATURE OF PRESUMPTIONS APPLICABLE TO THE ISSUE OF UNSEAWORTHINESS

A. Ninth Circuit

In a series of decisions, the United States Court of Appeals for the Ninth Circuit has placed the burden of proof

of unseaworthiness on the injured seaman or the personal representatives or heirs of deceased seamen.

The Court below, in applying the burden of proof of unseaworthiness to Mrs. Grabowski, cited *Walston v. Lambertsen*, 349 F.2d 660 (9th Cir. 1965) *cert. denied*, 382 U.S. 980, 86 S.Ct. 553, 15 L. Ed. 2d 470 (1966).

The *Walston* case involved a careful review of conclusions of law of the Trial Court. Those conclusions stated that there was no evidence to establish negligence and, further, there was no evidence to establish unseaworthiness of the vessel at or prior to the time of loss. Because no evidence of unseaworthiness in one or more particulars existed at or prior to the time of the loss, the Court then concluded there could be no presumption of unseaworthiness. The Court specifically found, after review of the entire record, that there was substantial evidence to affirmatively support conclusions of absence of negligence and absence of unseaworthiness in the vessel.

Lieberman v. Matson Navigation Company, 300 F.2d 661 (9th Cir. 1962) involved an action brought by a seaman injured aboard a ship which occurred when he slipped on a cardroom deck which was covered with soapy water. One count was brought under the Jones Act for negligence and the second count under the general maritime law alleged unseaworthiness. The Court stated that "whether unseaworthiness or negligence are a proximate cause of the accident are questions of fact. *Borgen v. Richfield Oil Corp.*, (9th Cir. 1958), 257 F.2d 505. The burden of proving either is on appellant. [citing cases]". The Court also noted, however, that it could not determine from the findings of fact whether the Trial Court had believed the plaintiff's

story and had not found negligence or unseaworthiness, or simply had disbelieved the plaintiff.

In *Ramos v. Matson Navigation Co.*, 316 F.2d 128 (9th Cir. 1963) the Court dealt with an action for damages based on unseaworthiness and for negligence under the Jones Act. In that case the Trial Court made a finding that the vessel was seaworthy and also findings that were related to the issue of negligence. In that case, the Trial Court made a finding that at all relevant times the vessel on which the claimant was injured was seaworthy. It is obvious in the *Ramos* case that the Court based its real determination on the clear impression that the Trial Court did not believe any portion of the claimant's testimony, either as to how the accident occurred or as to the nature or extent of the injuries suffered. In the action, the claimant had charged that the vessel was unseaworthy and that the stowage of laundry was unsafe and that he was not, therefore, provided with a safe area to work. He also made charges of negligence under the Jones Act and for maintenance and cure.

The *Walston v. Lambertsen* case includes the statements as to burden of proof attributed by the Court below in the instant case. However, it is to be noted that there were specific conclusions of law which appear to be, in reality, findings of fact. The Court found no evidence to establish unseaworthiness of the vessel at or prior to the time of the loss and sinking and further concluded that there was to be no presumption of unseaworthiness of the vessel because there was no evidence indicating either negligence or unseaworthiness in one or more particulars at or prior to the time of the loss. In *Walston*, there was no proof of the actual cause of the sinking of the vessel. There was no indica-

tion that the vessel sank because it could not withstand weather (the weather was calm). The ship was relatively new, not a wood vessel constructed more than twenty years years prior to the sinking. The Court stated (at 662):

> "The Court below obviously and properly believed that there could be no foundation for inference absent satisfactory proof of an unseaworthy condition which might reasonably be expected to relate directly to the sinking of the vessel."

Regardless of the statements in *Walston* as to the burden of proof, it is clear that there was substantial affirmative evidence introduced by the shipowners as to the complete history of the planning and construction of the vessel, that the vessel had withstood heavy seas on numerous occasions, and this affirmative evidence certainly supported the finding that the vessel was, in fact, seaworthy. This is in marked contrast to the instant case, where there was a notable lack of such affirmative evidence, *or* of a finding that the *North Sea* was seaworthy.

One can reconcile *Walston* with *Commercial Molasses* only by disregarding the language used by the Ninth Circuit and noting that, in each case, the shipowner *met* its burden of demonstrating seaworthiness of the vessel. The Court in *Commercial Molasses* recognized that an inference drawn from the sinking shifted the burden to the owner. The Ninth Circuit announced a very different inference, but, in reality, applied the same standard.

It is possible to interpret the opinion of the Court below in the instant case as stating the proposition that the burden of proof on the issue of unseaworthiness may be different in proceedings brought under the statutes for exoneration as against claims made directly in admiralty for

personal injury or death. That implication, which may be drawn from the opinion at 477 F.2d 1271 in footnote 1 should be rejected. Whatever this Court declares the burden of proof should be in claims for personal injury or death arising out of unseaworthiness, that burden should be the same in exoneration cases or in cases brought directly by claimants in admiralty. Obviously, a rule more favorable to claimants in exoneration cases would effectively circumvent the purpose of the limitation of liability statute; and, on the other hand, a rule which provided an advantage to the shipowner on the requisite burden of proof in an exoneration case would be grossly unfair to claimants in such proceedings, the forum for which was selected by the shipowners themselves.

B. Third Circuit

In *Eastern Gas & Fuel Associates v. Martin Marine Trans. Co.*, 190 F.2d 394 (3rd Cir. 1951) a claim for the loss of a cargo of coal was filed by the shipper, based upon the alleged unseaworthiness of a coal barge and the negligence of the owner. The trial court made findings in favor of the owner that the sinking of the barge was caused by peril of the sea constituting an excepted risk under the charter. The Court stated that no affirmative showing to offset the presumption of unseaworthiness had been made in the case. The Court stated at page 397:

> "It is sufficient that libellant was entitled to prevail on the basis of the inference of unseaworthiness which should have been drawn from the unexplained sinking in weather the vessel should have been able to withstand."

and reversed that portion of the judgment dealing with the unseaworthiness of the coal brage.

A similar presumption of unseaworthiness was applied by the 3rd Circuit in *R. D. Wood Company v. Phoenix Steel Corp.*, 327 F.2d 921, 923 (1964).

C. Fifth Circuit

In *Vega v. The Malula*, 291 F.2d 415 (5th Cir. 1961) the Court clearly indicated that a prima facie case of unseaworthiness had been created by the failure of a marine appliance being used for its normal expected purpose, and that there would be "an unremitting liability" on the part of the owner based on breach of the warranty of seaworthiness.

In *Gibbs v. Kiesel*, 382 F.2d 917, 919 (5th Cir. 1967) the Court held that doors which fell and injured a seaman during their ordinary intended use were defective and that, therefore, the vessel was unseaworthy as a matter of law.

Amicus curiae contends that the reliance of petitioner on the case of *Walker v. Harris*, 335 F.2d 185 (5th Cir. 1964) is amply justified. In that case, which relied upon *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 80 S.Ct. 926, 4 L. Ed. 2d 941 (1960) the Court clearly stated that seaworthiness is defined as "reasonable fitness to perform or do the work at hand." And that, therefore, once there is a showing that a vessel, or a part of a vessel, has failed under circumstances in which it is expected to operate, unseaworthiness had been established regardless of the care or prudence of the owner.

D. *The 84-H*

It should be noted that in the opinion of the Court below (477 F.2d at 1271-2) there is a discussion of and reliance upon the case of *The 84-H*, 296 F. 427 (2nd Cir. 1923)

cert. den. subnom., Randolph v. Bouker Contr. Co., 264 U.S. 596 (1924). It is abundantly clear from a reading of *The 84-H* that that case deals only with a claim founded on negligence and does not deal with a claim brought on a theory of unseaworthiness. Accordingly, although it has been used by several courts as authority for the proposition that the burden of proof is on the claimant to prove negligence *or* unseaworthiness, it is clearly authority only for the former proposition. And it is abundantly clear that the liability for negligence, alone, is a very different creature of the law from the liability founded on unseaworthiness.

CONCLUSION

Amicus curiae respectfully urges that this Court grant the petition for a writ of certiorari filed herein. It is essential that the protection of seamen in admiralty be maintained and that the action based upon the unseaworthiness of a vessel or equipment not be restricted or diluted by the imposition of a burden of proof which is not, historically, the seaman's to bear—and that the rule announced by the Ninth Circuit be rejected.

Respectfully submitted,

ARTHUR J. MANDELL, Chairman
Amicus Curiae Committee
JOSEPH PETER MYERS of Counsel
Amicus Curiae

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-461

SOPHIE M. GRABOWSKI, individually, as personal representative of the deceased, EDWIN T. GRABOWSKI, and as guardian of the estate of the minor children of EDWIN T. GRABOWSKI,
Petitioner,

v.

NORTHERN FISHING & TRADING COMPANY, INC., a corporation, owners of the fishing vessel NORTH SEA, and ALEUTIAN KING CRAB, INC., a corporation, charterer of the fishing vessel NORTH SEA, who herein petitions for exoneration from or limitation of liability,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONER

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

The Respondent's Brief, hereinafter referred to as (Resp. Br.), page 4, 8, suggests to this Court that no vessel, seaworthy or not, could have withstood this storm by inferring the vessel was lost as a result of wind of 180 miles per hour.

Those were not the findings of the trial court nor the evidence, nor the facts.

The winds actually recorded by the weather bureau, approximately nine miles from the site of the loss, showed that the recorded winds at the time of the loss, were approximately 50 to 60 miles per hour. The fishing vessel *"Sidney"* rode out the same storm.

The Respondent attempts to distinguish the holding of the Ninth Circuit in the instant case from the rule of the Fifth Circuit, *Walker v. Harris*, 335 F.2d 185 (5th Cir. 1964), by arguing (Resp. Br. 11), that it was not expected by the owners that the *"North Sea"* would operate under the subject weather conditions. This conclusion is not in the findings of the trial court nor in the record and is a logical impossibility.

The Findings of Fact show that both fishing vessels, the *"Sidney"* and the *"North Sea,"* had to leave the shelter of Urilla Bay because the wind changed direction and the bay no longer offered shelter from the storm. There was no place of shelter available, except another bay and to get there, it had to be exposed to the storm.

It is impossible to directly contrast the relative severity of the storm experienced by the *"North Sea"* and the *"Sidney,"* because at the time of the loss, they were approximately 60 miles apart. There was not a scintilla of evidence that the storm, as experienced by the *"North Sea"* was either equal to or greater than that experienced by the *"Sidney."*

There is a conflict between the circuits, and the trial court commented on the conflict In re Marine Sulphur Queen, 312 F. Supp. 1081 (1970) at 1098:

> ". . . Relying on *Admiral Towing Co. v. Woolsen*, the Court in Walston [9th Cir.] expounded the nature of the permissible presumption in a case like this as fol-

> lows: '. . . If a claimant establishes that a vessel is unseaworthy, the trial court may presume that the unseaworthiness was the proximate cause of the sinking, . . . [This] presumption . . . has been indulged only when the claimant has been able to establish to the satisfaction of the trial court that the vessel was unseaworthy at the time it departed on its last voyage."
>
> "The rule in *this Second Circuit permits the presumption of causation. It may also encompass the existence of unseaworthiness as well."*
> (Emphasis added)

The Circuit Court in the instant opinion, Petition for Writ of Certiorari, Appendix 8, 9, reviewed the evidence relative to the fact that there were rotting planks and teredo holes in the *"North Sea."*

The appellate court held the Petitioner was not able to sustain burden of proof by a preponderance of the evidence that the evidence of deficiencies in the vessel made it, in fact, unseaworthy, and that the aforesaid deficiencies proximately caused the loss.

The Respondent argues to this Court that there is no conflict.

That is not the conclusion of the trial court cited above; is not the opinion of the several other claimant's counsel who have applied for certiorari; is not the opinion of the trial bar as evidenced by the interest of the American Trial Lawyers as Amicus Curiae; and, is contrary to the fact.

CONCLUSION

The Petitioner, Sophie M. Grabowski, reiterates her prayer for relief that the Writ of Certiorari issue to the Ninth Circuit.

Respectfully submitted,

GALE P. HILYER, JR.
Attorney for Petitioner